Supreme Court, U.S.
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No. 03-877

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT KUHLMANN, Superintendent,
Sullivan Correctional Facility,

Petitioner,

- against-

ROBERT BOHAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO PROCEED AS A POOR PERSON

Joel A. Brenner, an attorney admitted to practice in this Court, hereby affirms the following:

I represent respondent Robert Bohan. I have accepted a reduced fee to prepare and file this opposition brief because Mr. Bohan is destitute (his affidavit of indigence is attached) and his family is paying my fee. However, neither Mr. Bohan nor his family can afford the additional cost of printing 40 copies of the opposition brief, which I have been informed would cost at least several hundred dollars.

WHEREFORE, respondent should be permitted to proceed as a poor person, and to file an originak and 10 copies of a typewritten brief.

Respectfully submitted,

JOEL A. BRENNER, Esq.
76 Tompkins Street
East Northport, New York 11731
(631) 757-9189
Counsel of Record for Respondent

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Robert Bohan, am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give any security therefor, I state that because of my poverty, I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am not presently employed. I have been a prisoner of the State of New York for the last eight years. The last date I was employed was 1991
and my salary or wages per month was $ 30.00 per day.

2. In the last twelve months I have not received any income from any source.

3. I do not own any cash and I do not have a checking or savings account.

4. I do not own any real or personal property (excluding ordinary household furnishings or clothing).

5. No one is dependent upon me for their support.

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to before me this 24th
day of November, 2003

NOTARY PUBLIC

R. Bohan
ROBERT BOHAN

No. 03-877

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT KUHLMANN, Superintendent,
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Petitioner,

- against-

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 15, 2004

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COUNTER-STATEMENT OF THE CASE[1]

Trial Court Proceedings

Prosecution Case

Alleged Motive for, and Events Preceding, the Shooting

Jamal Williams was a high school drop-out and unemployed except when he was selling crack cocaine - a drug he claimed *he* did not use - for Joseph Alvarez. He and Alvarez were "best" friends, and he admitted that he wanted *someone* to pay for his friend's death (Trial Transcript - hereafter "T". - 61-63, 100).[2]

Williams testified that, about six months prior to the shooting of Alvarez, he saw a "Mike" Bohan punch one "Junior"(another drug dealer), after which Junior shot at Mike, wounding a friend of Mike's. However, when Williams was asked to identify *Mike*, he pointed to a "Nicholas" in the audience (T. 65-6, 68-71).[3]

Williams said that he and Alvarez later met with a "Robert" at MacDonalds, and he told them to help him find Junior or he would "get both of us": on cross examination, Williams said that Mike/Nicholas, *not* Robert, was the person he and Alvarez met. Notably, when asked if Robert was respondent, Williams said he was **not** (T. 68, 71-2, 93-4).

Although Williams claimed that he had seen Robert three times a week for six months

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[1] The "Counter-Statement of Facts" is necessary to fulfil respondent's obligation to "point out in the brief in opposition ... any perceived misstatement [of fact] made in the petition". Rule 15.2.

[2] It should be noted that petitioner's recitation of the trial testimony is devoid of a single transcript references. Petition for Writ of Certiorari (hereafter "Pet.") at 4-5.

[3] This was only the first of several *mis*identifications by Williams.

between the altercation with Junior and the shooting, at the grand jury he said he had seen Robert only 3 or 4 time in his entire life and only once after the shooting (T. 94-96, 105). Williams ultimately admitted at trial that he did not know Robert "good" and that the *only* time he ever saw his face prior to the shooting was during the alleged meeting at MacDonalds (T. 106, 122).

Christopher Lopez, another crack dealer who was also Alvarez's cousin, said he saw respondent and Alvarez twice talking inside MacDonalds, but did not know what they said: Jamal Williams was *not* there (T. 165, 167-68, 170-2, 178).

Terrance Gillard, another crack dealer and friend of Alvarez, said that before the shooting respondent met him and Alvarez at MacDonalds, and Alvarez went inside and spoke with respondent alone. Notably, Gillard also did not testify that Williams was at the meeting (T.152-53).[4]

The Shooting and Subsequent Questionable Identifications

Although Williams testified the shooting took place at 10:25 p.m., Lopez testified that it occurred at 10:05 p.m. (T. 73, 173).[5]

Williams said that he was on the street when the shooting occurred: however, in the grand jury, he testified he was *inside* a building smoking a cigar-size marijuana "blunt" (T. 73, 83-84, 123).

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[4] The Magistrate and District Judges explicitly noted both the contradictory nature of Williams' testimony and the fact that other prosecution witnesses testified Williams was not present at the meetings allegedly attended by respondent. *See* Appendix to Petition for Writ of Certiorari - hereafter Pet. Appx - at 6a-7a and n.2, 45a-50a and n.4.

In sum, both Judges discredited Williams' testimony that respondent and Alvarez had meetings regarding Junior's whereabouts. That fact severely weakened the prosecutor's claim that respondent had any motive for shooting Alvarez, especially when considered in conjunction with Williams' impossibly contradictory testimony, *infra*, as to the identify of the actual shooter.

[5] As will be shown, *infra*, it is undisputed that respondent had an alibi for 10:05 P.M. Accordingly, the prosecution ignored the testimony of its own witness and asserted that the shooting took place at 10:25 P.M.

Furthermore, while, according to Williams, only one shot was fired (T. 74-76), it was stipulated that Alvarez was shot twice (T. 226), and another prosecution witness (Lopez), testified that a total of three shots were fired (T. 173). Williams also said it took the shooter *twenty minutes* to walk 1/2 block at a normal pace (T. 108-09).[6]

Although at trial Williams said the shooter wore a black and white jacket, and black pants, in other statements he said that the shooter wore blue jeans and a striped shirt (T. 78-9, 86, 124).[7] Of particular importance - and contradicting every other witness to the crime - Williams said the shooter was *not* wearing a "hoody", *i.e.*, a hooded sweatshirt (T. 89).

Williams said that the shooter had a silver gun with a black handle, but in a prior statement he said he did not see the gun at all (T. 98, 100-01).

Although Williams first *named* one "Robert" as the person who shot Alvarez, when asked to *identify* that person, he pointed to respondent's brother. Then, when asked if the "Robert" who shot Alvarez was in the courtroom, Williams said he was *not*. Finally, he identified the shooter as "Mike" (T. 68-8, 93).[8] Williams said he attended a lineup the following day and he picked out respondent as the shooter: then, and contrary to his previous testimony that the shooter was **not** in the courtroom,

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[6] No doubt, Williams's perceptions were effected by the marijuana he was smoking at the time. In any event, even the prosecutor conceded this testimony was "wrong" (T. 511).

[7] It was stipulated that Bohan's brother Nicholas was the person in the "striped shirt"(T. 156).

[8] In his opening statement, the prosecutor had told the jury that Jamal Williams was the "heart" of the prosecution case (T. 38-39). However, based on the foregoing contradictions and inconsistencies, the prosecutor was later forced to concede that Williams "obviously identified the brother ... [and] failed to" identify respondent (T. 68).

he identified respondent as the person who shot Alvarez (T. 68, 77).[9]

Finally, Williams admitted that he was testifying against respondent to "help out" Alvarez's grieving mother (T. 111).

Other prosecution witnesses completely contradicted Williams' testimony.[10]

Shawn Criss was on the street standing 6-7 feet from Alvarez when he saw a "Spanish looking" person approach wearing a "*hoody* [and] hat": it was "dark" at the time, and the shooter's entire face and head were covered (T. 143, 147). The shooter was *not* in the courtroom, *i.e.*, was *not* respondent (T. 142).

Michael Jenkins had been arrested for selling crack cocaine, the prosecution offered him no jail time if he testified against respondent, and, accordingly, he said he saw respondent shoot Alvarez. However, on cross-examination, he was forced to admit that, he had never seen respondent before, that he could "[n]ot clearly" see the shooter's face, and that in testimony before the grand jury he said that he could *not* identify the shooter because the shooter's head was "completely covered" by a "hoody" (T. 184, 193, 195-99).[11]

In addition, Jenkins said that the shooter had black hair and Williams testified the shooter had

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[9] In view of the inconsistencies and contradictions throughout Williams' testimony, it is not surprising that both the Magistrate and District Judge gave scant notice, and even less credence, to Williams' belated and altogether unsatisfactory in-court "identification" of respondent. *See* Pet. Appx at 7a, 46a.

[10] Although both the Magistrate and District Judge noted these inconsistencies and contradictions (Pet. Appx at 6a-8a, 54a-50a), petitioner's recitation of the trial testimony completely ignores them (Pet. at 4-5).

[11] No doubt that was why the prosecutor specifically told the jury in his opening that the *only* eyewitness who would identify respondent as the perpetrator was Williams (T. 38-39).

blond hair (T. 78-79, 198), whereas respondent has brown hair (PSR at 1).

The Defense Case

Evidence Exculpating Respondent, and Incriminating Another, as the Killer

Carmen Rodriguez knew both Alvarez and respondent. She was standing about two feet from Alvarez when he was shot: although she could not see the shooter's face clearly - because he had a hood on - she knew it was *not* respondent because the shooter was a "short guy" (about 5'3" tall) and had "dark skin"(T. 316-8, 331).[12]

She spoke with the police and the trial prosecutor twice about the incident, and both times they tried to confuse her in an attempt to get her to change her story (T. 325-26).[13]

Jose Rivera also knew respondent. On the night of the crime, he heard gunshots and a "Puerto Rican kid with black hair with a hoody ... flew around the corner". Notably, Rivera said the person was *not* respondent (T. 364-65, 403, 415).

Julia Feci, respondent's grandmother, testified that he lived with her at the time of the crime (T. 228-30). She vividly remembered the date of the shooting, for the following reasons:

Respondent had been out earlier that day, but had arrived home at about 8 to 8:15 p.m. and,

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[12] Respondent is 5'-11" and white (Pre-Sentence Report at 1).

[13] On rebuttal, a detective testified that Rodriguez made the following statement: "Robert said to Joey [']give me my money, motherfucker['] and Joey said [']I don't [owe you] no money[']; so Joey turned around and ... that is when Robert shot him" (T. 434-35).

Since it was the prosecutor's position that respondent shot Alvarez for failing to reveal Junior's whereabout, this alleged statement - that respondent shot Alvarez over some previously unknown debt - is simply incredible (and supports Rodriguez's testimony that she never made it).

Another explanation for the foregoing is that the shooter did make the statement Rodriguez said he made but that the shooter was someone else - such as a rival drug dealer to whom Alvarez owed money - not respondent.

from then on until 11 p.m., he was in his room with his friends watching television. At one point she had served them coffee in that room. One of the boys (Roberto Cruz, known as "Pidge") came to her room after 10:15 to say good night: she knew the time because he came in during a commercial break in her favorite TV program. Cruz spoke with her a while, and he then left the apartment at 10:30: she knew that time because she had looked at the clock in her room when he left. She then went into respondent's room where she found that the boys had broken a coffee table and twin beds she had recently purchased: she told the boys to leave, went into her bedroom, and sat by the window. Respondent followed her, apologized, and sat with her until 11 p.m. (T. 229-34, 238-40).

Roberto Cruz was a security guard. On the night of the crime he and some of his friends went to respondent's apartment "a bit after eight o'clock": respondent and his grandmother were there. They watched a children's TV show with one of respondent's younger sisters until after 9:00 p.m. Shortly after 10:00 p.m. that evening, some furniture broke while they were wrestling on it: when respondent's grandmother saw the broken bed, she told the boys to leave, and went back into her room. Cruz said good night to her, and went home: he knew that it was 10:15 p.m. when he left the apartment because he looked at his watch (T. 252-4, 261-65, 269).

He never saw respondent wear a "hoody" (T. 270).

Exclusion of Bernardo Rodriguez's Testimony

Prior to the testimony of Feci and Cruz, there was a discussion regarding whether the prosecutor would allow defense counsel to call alibi witnesses as to whom he had not given alibi notice. When Bernardo Rodriguez's name was first mentioned, the prosecutor voiced no objection to Rodriguez testifying: however, the trial judge, *sua sponte*, ordered a hearing regarding whether Rodriguez could be cross-examined on his alleged "failure" to come forward prior to the trial (T.

223).[14]

At the hearing, **Bernardo Rodriguez** testified that on January 12, 1993, shortly after 10:00 p.m., he stopped to talk with several of his friends, including Roberto Cruz, standing in front of the apartment building where respondent and his family lived: the boys were laughing that respondent's grandmother had just thrown them out of her apartment. While they were talking, Rodriguez looked up at respondent's apartment and saw respondent, looking upset, and his grandmother at the window. A few minutes later, Cruz left, but Rodriguez remained (T. 281-85).[15]

When the court suggested that Rodriguez's testimony could be excluded because of the failure to give notice, defense counsel argued that the prosecutor had allowed other unnoticed witnesses like Mrs. Feci and Cruz to testify, to which the court responded:

> They're bending over backwards so this won't later become *ineffective assistance of counsel* on appeal.... I did more than I'm required to do so this will not be overturned on an issue like that (T. 305-6).

When the court asked the prosecutor if he would consent to Rodriguez testifying, *for the first time* the prosecutor weakly asserted that he would "rather" Rodriguez not testify, and the court precluded him because defense counsel had "not given ... good cause" why Rodriguez was not named

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[14] The fact that the trial judge knew there was an issue as to Rodriguez's alleged failure to come forward shows that the parties had discussed Rodriguez's potential alibi testimony *previously*, and that the prosecutor had *prior* notice thereof. At the evidentiary hearing held before the Magistrate that fact was established. *See* Appendix to Respondent's Appeal to Second Circuit, Exh. G at 40 (prosecutor conceded that he had known of Rodriguez since "we were about to begin jury selection", *i.e.*, a week *prior* to Rodriguez's appearance in court).

[15] This testimony would have specifically corroborated the testimony of respondent's grandmother both that Cruz had been asked to leave the apartment and that she and respondent sat at her bedroom window after he apologized to her.

as an alibi witness (T. 307-8).

Defense counsel asked "What is the prejudice?", to which the court responded "This case is two and a half years old" (T. 310). The prosecutor later asserted that he had been prejudiced because "Had I known his name earlier I could have investigated him". However, he also conceded that he *had* conducted an investigation of Rodriguez since he had learned of his identity and found that he had no criminal record: defense counsel asserted that because the prosecutor "found [Rodriguez] was clean ... [he] rejected him", *i.e.,* because he had no basis to impeach him on cross-examination (T. 344-8, 354-60).

Despite the foregoing, the court adhered to its prior ruling excluding Rodriguez (T. 360-1).

Prosecutor's Summation

The prosecutor told the jury that even if they believed the alibi testimony of Feci and Cruz, they could still convict respondent because he had time to leave the apartment, commit the crime and return, *i.e.,* the testimony of Cruz was "too early" while that of Feci was "too late" (T. 517-8).

Deliberations And Verdict

After lengthy deliberations, during which the jury reheard the testimony of several witnesses, respondent was found guilty of second degree murder (T. 568-72).

The State Appellate Proceedings

The Appellate Division, First Department upheld respondent's conviction, holding that the preclusion of Rodriguez's testimony was proper, and that defense counsel's failure to file an alibi notice was neither incompetence of counsel nor deprived respondent of a fair trial. *People v. Bohan,* 257 A.D.2d 443, 684 N.Y.S.2d 514 (1st Dept), *lv den.,* 93 N.Y.2d 871, 689 N.Y.S.2d 433 (1999).

Federal Court Proceedings

Respondent filed a petition for a writ of *habeas corpus* arguing, *inter alia*, that the preclusion of Rodriguez's alibi testimony deprived him of his right to present his defense, and that defense counsel had been incompetent for not filing an alibi notice. The Magistrate Judge to whom the petition was referred held an evidentiary hearing on those claims.[16]

Robert Bohan testified that when Earl Rawlins became his defense counsel he told him of his alibi witnesses, including Bernardo Rodriguez, and he asked Rawlins to call Rodriguez. After he was convicted, Rawlins told him to appeal and said that "my best issue was my alibi ... because he fucked [it] up". Exhibit G to Respondent's Appendix on Appeal to Second Circuit - hereafter "Exh. G." - at 12-14, 20.

Stewart Silberg, the trial prosecutor, testified that based upon the grand jury testimony of respondent and others, there was an alibi defense. Exh. G at 39-40.

Silberg first became aware of Bernardo Rodriguez's name as jury selection was beginning.[17] Rodriguez's "rap sheet" showed that he had no criminal record: in addition, Silberg conceded that there were 7-10 "real" days between the time he learned of Rodriguez's identity and the end of the People's case (when Rodriguez was offered as a witness), that during that time he had spoken to both a criminal investigator and one of the case detectives who turned up no incriminating evidence against Rodriguez, that he had read the statement Rodriguez had given to defense counsel, and that he neither asked defense counsel if he could interview Rodriguez nor asked for the "three-day adjournment" to

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[16] Petitioner's brief, and self-serving, summary of that hearing is, once again, unaccompanied by any transcript references. Pet. at 7.

[17] Jury selection began on July 5, 1995 and the discussion of the preclusion of Rodriguez's testimony took place a full week later, on July 12 (T. 220).

investigate Rodriguez further. Exh. G at 40-49, 59-61, 66.[18]

Silberg conceded that Rodriguez was the only one of the unnoticed alibi witnesses to whose testimony he would not consent. Exh. G at 49.

When defense counsel began questioning Silberg regarding his summation - where Silberg had told the jury that the alibi testimony of Mrs. Feci was "too early" and that of Cruz was "too late" (T. 517-8) - the Magistrate Judge said "I understand the point about the *emphasis* that Mr. Silberg put on the *gap*". Exh. G at 54-5.

Bernardo Rodriguez was 27 years old, a college graduate, employed as a public school teacher, had never been arrested, and was on the "waiting list" to be a police officer. Exh. G at 67-8, 74.

On January 12, 1993 he was helping his father operate a "hotdog stand" at City College. When it closed at 9 p.m. he walked to the subway, caught the same train he always did at 9:20, and took it to 168 Street: he looked at his watch when he stopped in a store between 170-171 Street for a snack, and it was 9:55 p.m.. When he got to the corner of 171 Street he saw some of his friends and he joined them. They were in front of respondent's apartment house, and each was telling his version of how "Granny" had thrown them out of her apartment for breaking her furniture: when he looked up at the window they were pointing at, he saw respondent and his grandmother at the window. He stayed in front of the apartment house until 11:15 p.m., when he went home. Exh. G at 68-74, 81-92, 95-6, 102.

Earl Rawlins was respondent's trial attorney. Exhibit H to Respondent's Appendix on

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[18] Pursuant to the mandatory requirements of N.Y.C.P.L §250.20 (3)(Pet. at 4), had Silberg made such a request, the judge would have had to grant it.

Appeal to Second Circuit - hereafter "Exh. H." - at 3. He did not file any alibi notice because he had forgotten that Bernardo Rodriguez's statement was in his file. When he found the statement the trial was about to begin, so he simply told the prosecutor he wanted Rodriguez to testify as an alibi witness. Exh. H at 4, 11.

He specifically testified that his failure to file an alibi notice was "*not* ... to sandbag or get an unfair advantage on the prosecutor":

> Q. Now, when you became aware of Bernardo Rodriguez, were you a little wary about letting us have information about him, because you were afraid that it wouldn't work out well if we had an opportunity to speak to Mr. Rodriguez?
> A. No, it's the contrary. As I reviewed the letter ... I would be more than happy to give you that letter so you could check it out ...
> Q. It wasn't a concern of yours that upon investigation of Mr. Rodriguez that in effect, he might be nullified at trial?
> A. No (Exh. H at 4, 7).

Rawlins also corroborated respondent's testimony that, after sentencing, Rawlins admitted to respondent that he had "made a mistake in handling [the] alibi [testimony]" and "that would be an appealable issue". Exh. H at 10.

Magistrate's Report And Recommendation[19]

The Magistrate issued a 75-page Report and Recommendation that the writ be granted.

First of all, the trial evidence was analyzed in great detail, with particular emphasis on the numerous inconsistencies and contradictions in the testimony of the prosecution witnesses on crucial points of evidence. Next, the alibi testimony that had been admitted was set forth, also with reference to its weaknesses and, in particular, the fact that the prosecutor had characterized that testimony in summation as "too early and too late". Finally, Bernardo Rodriguez's testimony at the State court

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[19] Pet. Appx at 43a-106a.

hearing, as well as the federal hearing testimony, was then set forth. Pet. Appx at 44a-69a.

Turning to the alibi preclusion issue, the crux of the Magistrate's holding was that:

> [N]o evidence was presented either at trial or at the hearing held in this Court from which it could be inferred that Mr. Rawlins' failure to give notice to the prosecution of Bernardo Rodriguez was willful or motivated by a desire to gain a tactical advantage.... The record amply supports the conclusion that Mr. Rawlins' failure to come forward earlier with Mr. Rodriguez as an alibi witness was due to a combination of his last minute trial preparation, forgetfulness, and ineptitude... The state [trial] court never made any finding of willfulness nor inquired into whether defense counsel's 'failure to comply with the notice requirement was designed to frustrate the truth-seeking function of the trial'.... Again, on appeal, the state court did not probe this issue and merely found that the trial court properly exercised its discretion in precluding Mr. Rodriguez from testifying... Here, ...the trial court could have minimized any prejudice to the prosecution with a short adjournment, and therefore some finding of willfulness was necessary....Where the state court has not made any finding as to wilfulness, as is the case here, the petitioner is denied his right to present a defense. Pet. Appx at 88a-91a.

Based on the foregoing, the Magistrate found that "By not considering 'whether defense counsel had willfully or in bad faith failed to comply with the alibi notice requirement', ...the [State courts] did not follow Supreme Court precedent as established in *Taylor* [*v. Illinois*, 484 U.S. 400 (1988)]" and, under *Williams v. Taylor*, 529 U.S. 362 (2000), their decisions excluding Bernardo Rodriguez's alibi testimony were "contrary to" settled Supreme Court case law. Pet. Appx at 95a.

The Magistrate also found this error was not harmless. In particular, the inconsistencies in the testimony of the two alibi witnesses who had testified were noted, as was the prosecutor's summation in which it was argued that "the testimony from the two alibi witnesses was not inconsistent with the prosecution's theory of the case, because neither could account for the petitioner's whereabouts from a little after 10:00 to 10:45 p.m., thus giving him enough time to commit the murder", *i.e.*, "what you get is too early and too late" (T. 517-8). By contrast, "Mr. Rodriguez's testimony places the petitioner at home during the period of time *unaccounted for* by

other witnesses, thus providing critical support to Mr. Bohan's alibi and undermining the prosecutor's argument". In addition, the Magistrate explicitly noted that the District Attorney had "conceded that Mr. Rodriguez's testimony, if believed, was *not cumulative*". Pet. Appx at 96a-102a.[20]

Turning to the related issue of defense counsel's failure to file an alibi notice for Rodriguez, the Magistrate found that the first prong of *Strickland v. Washington,* 466 U.S. 668 (1984) had been satisfied because "Mr. Rawlins' failure to provide notice was caused by his sheer ineptitude", "in no sense can that failure be attributed to a strategic choice", and Rawlins' misconduct "'clearly falls outside of the wide range of professionally competent assistance'". Pet. Appx at 102a-103a. Addressing the second, or "prejudice", prong of *Strickland*, the Magistrate ruled that "the preclusion of Mr. Rodriguez deprived the petitioner of a critical witness who would have provided testimony closing the time gap in the alibi" and "it is more than a 'reasonable probability' that the trial result would have been different 'but for' the errors of Mr. Rawlins, thus depriving the petitioner of a fair trial". Pet. Appx at 103a.

The state appeals' court decision that Rawlins' incompetence "could not have deprived [respondent] of a fair trial" was "an unreasonable application" of *Strickland* because it was "objectively unreasonable" to find that Rawlins' misconduct had no effect on the outcome of the trial, *i.e.*, "There was no reasonable justification for [the state court's] conclusion that the preclusion of Mr. Rodriguez did not result in the deprivation of a fair trial for the petitioner". Pet. Appx at 104a-105a.

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[20] Regarding any claim that Rodriguez's testimony was not believable, the Magistrate summarized that testimony, held that "Mr. Rodriguez is not an inherently incredible witness", and then ruled that other matters, such as his relationship with respondent and/or any inconsistencies were "matter[s] of credibility, not reliability", and presented "a question for the jury, not this Court". Pet. Appx at 100a-102a.

Accordingly, the Magistrate recommended that the writ be granted. Pet. Appx at 105a-106a.

The District Judge's Decision[21]

The District Judge issued a 47-page decision "fully adopt[ing] the Report and Recommendation" and granting the writ.

As had the Magistrate, the District Judge (a) first analyzed the trial evidence in great detail, with particular reference to the numerous inconsistencies and contradictions in the testimony of the prosecution witnesses on crucial points of evidence, (b) set forth the alibi testimony, also referring to it's weaknesses, and (c) set forth, the State court hearing testimony, and the federal evidentiary hearing testimony. Pet. Appx at 6a-18a.

After summarizing the Magistrate's ruling on the alibi preclusion issue, the District Judge turned to the District Attorney's objections thereto.

First of all, the District Attorney argued that the State court decisions were not "contrary to" *Taylor, supra*, on the ground that case had not mandated a finding of "willfulness" as a pre-requisite to preclusion of unnoticed alibi testimony. However, citing to and quoting from *Taylor*, the District Judge held that *Taylor had* mandated that willfulness *was* required for such preclusion.[22] Pet. Appx at 28a-32a.

Next, the District Judge rejected the argument that the state courts had made the required finding of willfulness. The District Judge found that while the trial court had ruled that Rawlins had not shown "good cause" for failing to file the alibi notice, "the absence of a good excuse is not

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[21] Pet. Appx at 5a-42a.

[22] Although the "level" of the willfulness required might vary depending on the availability of "less onerous sanctions" and/or with the degree of prejudice to the prosecution. *Ibid.*

necessarily commensurate with willful conduct".[23] Finally, it was noted that the Appellate Division was completely silent on this issue. Pet. Appx at 32a-33a.

The District Judge next rejected petitioner's argument that willfulness need not have been shown because the Magistrate erred when he held that any "prejudice" from allowing Rodriguez to testify could have been minimized by a short adjournment to investigate that witness.[24] In response, the District Judge first noted that such an adjournment need not "eliminate", but only "minimize", any such prejudice. Next, it was observed that if, as petitioner contended, Rodriguez's testimony was a "sham", that fact would have been easy to show, *e.g.*, through the testimony of other occupants of the apartment who had not mentioned Rodriguez in their statements to the police: in that regard, the Judge noted that one of those persons (Roberto Cruz) had testified at the trial, and another (Alberto Montilla) had been in the courtroom throughout the trial. Pet. Appx at 32a-33a.[25]

Turning to the issue of harmless error, the argument that Rodriguez's testimony would have been cumulative was rejected on two grounds: such testimony would have bolstered the testimony of the other alibi witnesses, and it would have negated the trial prosecutor's summation regarding the alleged "time gap" in Feci and Cruz's testimony. As the Judge expressly noted, "Ironically, although

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[23] Noting that the Magistrate had credited Rawlins' testimony that he had not failed to give alibi notice out of willfulness or to gain an advantage over the prosecution, the District Judge agreed that "the record convincingly supports the finding that Rawlins simply mishandled the matter..." Pet. Appx at 31a.

[24] As the District Judge had noted previously (Pet. Appx at 9a, n.3), an adjournment of up to three days would have been required under C.P.L. §250.20 (3), had the prosecutor requested it.

[25] It must also be noted that (a) neither during the 7 days between learning of Rodriguez's identity and the State evidentiary hearing, (b) nor during the 3 months between oral argument before the Magistrate and the Federal evidentiary hearing, did respondent unearth a single shred of evidence that would impeach Rodriguez.

the prosecution adamantly maintained at trial it would be prejudiced by the presentation of ... Rodriguez's testimony, it now asserts that the same testimony would have been cumulative and inherently incredible". Pet. Appx at 35a-38a.

Furthermore, the argument that Rodriguez was lying was dismissed as "of no consequence" because "the degree to which ... Rodriguez's credibility was affected by his interests and by inconsistent statements of other witnesses is a matter for the jury, not the Court". Pet Appx at 37a

Turning to the incompetence of counsel issue, it was first noted that petitioner had not objected to the Magistrate's findings that (a) Rawlins' failure to serve any alibi notice "was caused by his sheer ineptitude" and (b) that his misconduct "clearly falls outside the wide range of professionally competent assistance", *i.e.,* it was conceded that the first prong of *Strickland,* had been satisfied. Pet. Appx at 40a, n.14.

With regard to the second *Strickland* prong, petitioner argued that respondent was not prejudiced on the ground that Rodriguez's testimony was "unreliable and ... would not have affected the outcome of the trial". However, the District Judge held that (a) Rodriguez's testimony was *not* incredible as a matter of law, (b) "If the jury, or *any single juror*, were to credit ... Rodriguez's testimony *even partially*, ... so that it created a reasonable doubt about Bohan's guilt, he would have been acquitted or entitled to a new trial", and (c) there was "more than a 'reasonable probability' that the trial result would have been different 'but for' Rawlins deficient performance ...". Pet. Appx at 35a-38a, 41a-42a.

Based on the foregoing, the District Judge ruled that the Appellate Division finding that Rawlins' incompetence did not deprive respondent of a fair trial was "an unreasonable application of" *Strickland.* Pet. Appx at 41a-42a.

Accordingly, the writ was granted. Pet. Appx at 42a.

The Court of Appeals' Decision

In a summary, and unpublished, order, the Second Circuit affirmed "for substantially the reasons stated by the district court". The court did assert that "we have doubts as to whether *Taylor v. Illinois* prohibits state courts from precluding an un-noticed alibi witness from testifying if less onerous sanctions are available, absent a finding of wilfulness". Pet. Appx at 2a-3a.

After rehearing was denied (Pet. Appx at 4a), petitioner sought *certiorari*.

REASONS FOR DENYING THE WRIT

1. Petitioner asserted that *Taylor v. Illinois*, 484 U.S. 400 (1988) did not require willfulness as a prerequisite to the preclusion of evidence for violation of a discovery rule. Further, petitioner purported to find support for that assertion in an alleged "split" in the Circuits on that issue. Finally, petitioner asserted that *certiorari* should be granted both to resolve the alleged split and to interpret *Taylor* in a way that does not "eviscerate" discovery provisions.

Contrary to the foregoing, (a) *Taylor* did require willfulness as a prerequisite to the preclusion of evidence for violation of a discovery rule, (b) the "split" asserted by petitioner is more apparent than real, and (c) in any event, *certiorari* should not be granted because, for reasons which will be set forth in full below, any decision on the *Taylor* issue would constitute an "advisory opinion".

(a) A fair reading of *Taylor* establishes that this Court held that a finding of willfulness was a prerequisite to the proper imposition of the preclusion sanction.

The operative facts in *Taylor* are easily stated: the State judge found that defense counsel's violation of a discovery rule regarding naming anticipated witnesses was "willful", and she precluded the defense from calling an un-noticed witness. 484 U.S. at 405.

Upholding that decision, this Court first noted that "We find that such a sanction [preclusion] is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment, and find no constitutional error on the *specific facts* of this case", *i.e.,* where *willfulness* was present. *Id.* at 402.

The Court then noted that "there are instances in which they [*i.e.,* sanctions other than preclusion] would perpetuate, rather than limit, the prejudice to the State and the harm to the adversary process". *Id.* at 413. That remark can only have been addressed to *willful* violations, because *unintentional* violations would not be deterred by the preclusion sanction. That is made clear by the immediately following sentences, *i.e.,* "Defendants who are *willing to fabricate* a defense may also be *willing to fabricate* excuses for failing to comply with a discovery requirement", *ibid.*, and "If a pattern of discovery violations is explicable only on the assumption that the violations were *designed to conceal a plan to present fabricated testimony*, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited". *Id.* at 414.

Based on the foregoing, the Court's *holding* was:

> If ... [a discovery violation] was willful and motivated by a desire to obtain a tactical advantage ..., it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.... The trial judge found that the discovery violation in this case was ... willful, ... the inference that [defense counsel] was deliberately seeking a tactical advantage is inescapable...., [and] it is plain that the case fits into the category of willful misconduct in which the severest misconduct is appropriate. *Id.* at 415.

Notably, the Court also held that, once willfulness was shown, whether lesser sanctions might have ameliorated any prejudice was irrelevant. *Ibid.* That is further evidence that, although issues such as prejudice and lesser sanctions are *generally* relevant to the determination of the proper sanction, proof of willfulness is an absolute prerequisite to the imposition of the ultimate sanction of

preclusion.[26]

That the foregoing is the holding of *Taylor* is strengthened by the Court's subsequent references to *Taylor*. *See, e.g., Michigan v. Lucas,* 500 U.S. 145, 152 (1991)("We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, ... we stated explicitly ... that there could be circumstances in which preclusion was justified because a less severe penalty 'would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.' The trial court found that Taylor's discovery violation amounted to 'willful misconduct' and was designed to obtain a tactical advantage.' Based on these findings, we determined that ... 'the severest penalty was appropriate'.").[27]

In sum, the lower courts properly held that *Taylor* required the most culpable misconduct - willfulness- to justify the most "extreme" sanction - preclusion - and that such was not present in this

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[26] Even the dissenting Justices, who would not have permitted preclusion for a willful violation of the discovery rules by defense counsel, would have permitted preclusion for such a willful violation by the defendant. *Id.* at 433, 436. Thus, even the dissenting Justices provide further support for the majority's position that willfulness is a prerequisite to preclusion.

[27] The foregoing also rebuts petitioner's hyperbolic claim that the decision in this case would "eviscerate" discovery rules. Pet. at 13. On the contrary, in the absence of willfulness, it leaves prosecutors free to ask, and courts free to agree, to impose any and all sanctions other than the "most extreme" sanction of preclusion.

Petitioner's related claim - that courts in New York, Connecticut, and Vermont, the three states in the Second Circuit, will "act at their peril" in precluding evidence for discovery violations (Pet. at 13) - is also incorrect. That is so because (with the exception of the court in *this* case), the State courts in those States have uniformly (and properly) interpreted *Taylor* as requiring willfulness to justify preclusion. *See, e.g., People v. Walker,* 294 A.D.2d 218, 219, 743 N.Y.S.2d 403, 404 (1st Dept 2002)(preclusion permitted only where discovery violation was "willful", citing *Taylor*); *State v. Passino,* 161 Vt 522, 525-6, 640 A.2d 547, 550-2 (Vt. 1994)(same); *State v. Carter,* 228 Conn. 412, 426-429, 636 A.2d 821, 829-30 (Conn. 1994)(same).

case.[28]

(b) Petitioner asserted that "the Circuits are split" on the issue of whether preclusion is permissible in the absence of a willful violation of a discovery statute.

First of all, in view of the foregoing, any of the Circuits which held that willfulness was not required to invoke the preclusion sanction were misapplying a clearly stated rule of law. By this Court's own Rules, that is *not* a proper basis for granting *certiorari*. Rule 10 ("Certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law").

Secondly, any alleged split in the Circuits is more apparent, than real.

Initially, it must be noted that petitioner conceded that both the Second and Ninth Circuits have consistently held that *Taylor* requires a finding of willfulness. Pet. at 10.

Furthermore, petitioner's argument that other Circuits are to the contrary is based on isolated and partial snippets, many of which are pure *dicta*.

District Of Columbia Circuit. In *United States v. Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992), the court stated "We think that any requirement of bad faith as an absolute precondition to exclusion would be inconsistent with the *Taylor* Court's references to trial court discretion and its extended discussion of the relevant factors".

First of all, this Court's "references to trial court discretion and its extended discussion of the relevant factors" was with regard to its discussion of sanctions in general, not the extreme sanction of preclusion. 484 U.S. at 410-14. As a matter of fact, the Circuit implicitly conceded that fact when it noted that "Authorizing the trial court to demand an explanation for the delay, the Court [in *Taylor*]

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[28] This Court has denied *certiorari* in numerous other cases alleging uncertainty in this portion of the *Taylor* decision. *See, e.g., Tyson v. Trigg,* 50 F.3d 436 (7th Cir. 1995), *cert. den.*, 516 U.S. 1041 (1996), Petition for Writ of *Certiorari*, Dkt No. 94-2050, at Point II.

said that 'if the delay was willful and motivated by a desire to obtain a tactical advantage ...', exclusion would be 'entirely consistent' with the purposes of the compulsory process clause". 970 F.2d at 910. Finally, *Johnson* was cited in *Bowling v. Vose,* 3 F.2d 559, 561 (1st Cir. 1993), *cert. den.* 510 U.S. 1185 (1994) as a case "affirming exclusion ... [because it] involve[d] willful conduct".

First Circuit. In *Chappee v. Vose,* 843 F.2d 25, 29 (1st Cir. 1988), it was stated that *Taylor* "declined to cast a mechanical standard to govern all possible cases". However, all the quoted statement meant was that *Taylor* had set forth a number of factors - such as the amount of prejudice to the prosecution, alternative sanctions for minimizing any such prejudice, etc. - to consider in determining what sanction was permissible for non-compliance with State pre-trial discovery statutes. Of greater pertinence here, that statement did *not* mean that the First Circuit was holding that *Taylor* did not require a finding of willfulness as an absolute pre-condition to such preclusion.

First of all, the First Circuit's opinion is replete with references both to *Taylor*'s insistence on willfulness and that the discovery violation in the case before it was, in fact, willful. 843 F.2d at 27-32. Accordingly, even if the quoted passage bears petitioner's interpretation, it is a mere *dictum.*

Furthermore, the First Circuit explicitly referred to *Taylor* as setting forth a "rule of decision", *i.e.,* that willfulness is a precondition to preclusion. 843 F.2d at 30. As matter of fact, *Chappee* has been cited as holding precisely that, both by the First Circuit itself, and other courts. *See, e.g., Bowling v. Vose, supra,* 3 F.3d at 561 (referring to "circuit court cases affirming exclusion in response to discovery violations involve willful conduct. *See ... Chappee v. Vose...*")[29]; *People v.*

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[29] Judge Torruella, who authored *Bowling*, was on the panel that decided *Chappee.* Furthermore, *certiorari* was *denied* in *Bowling.* Lastly, *Bowling* was cited in *Tyson v. Trigg,* 50 F.3d 436, 445 (7th Cir. 1995), as an example of a court which "believe[d] ... that the exclusion of a witness or witnesses who would be helpful to the defendant is permissible only if the violation of the discovery order was deliberate ... ".

Huang Qike, 182 Misc.2d 737, 747, 700 N.Y.S.2d 640, 648 (S. Ct., K. Co. 1999)(asserting that "federal courts will exclude evidence in response to a discovery violation only if willful conduct is involved ... *Chappee v. Vose* ...").

Fifth Circuit. It is true that in *United States v. Alexander*, 869 F.2d 808, 812 (5th Cir. 1989), it was stated that "The Supreme Court's decision in *Taylor* gives us little guidance in determining whether the preclusion sanction is permissible"; however, that merely acknowledged that *Taylor* did not set forth a "bright line" rule governing every case, *i.e.,* that *Taylor* requires a trial court to examine many factors. Moreover, on the ground that any error in imposing the preclusion sanction was harmless, the Circuit expressly declined to decide if *Taylor* required willfulness. *Ibid.* Therefore, to the extent that the above quoted statement supported petitioner's position, it was pure *dictum.*[30]

In any event, the Fifth Circuit does not seem to have had difficulty in understanding or applying *Taylor* in later cases. *See, e.g., United States v. Mizell,* 88 F.3d 288, 294-5 (5th Cir. 1996)("The Supreme Court has held that a [trial] court can preclude a defendant from calling a witness as punishment for the defendant's willful violation of a discovery order. *See Taylor* [*v. Illinois*, 484 U.S. 400,] 414 [1988] (holding that preclusion of a witness's testimony was appropriate where the defendant's violation of a discovery request was 'willful and motivated by a desire to obtain a tactical advantage')..... There is no indication that Mizell's omission of Turnage's name on her witness list was willful or done out of an attempt to gain an unfair advantage over the prosecution. Indeed, the district court did not find that Mizell willfully violated the discovery rules... As a result, Mizell's rights under the Compulsory Clause of the Sixth Amendment were violated by the court's

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[30] It is worth noting that the *Government*, citing to, and quoting from, *Taylor* read that case as permitting preclusion only "in any case in which the discovery abuse 'was willful and motivated by a desire to obtain a tactical advantage, ...". *Ibid.*

preclusion of Mizell's witness").

Seventh Circuit. In *Tyson v. Trigg, supra*, the court was highly critical of *Taylor* on the asserted ground that, as a result of *Taylor*, discovery rules will become "weak if they can only be enforced against willful violators". 50 F.3d at 445. Based thereon, the court stated that "Our court has yet to take a position on the question [whether preclusion is permissible only if the violation of the discovery order was willful] ... and *Taylor* itself appears to leave the question open". *Ibid.*[31]

Of course, the first assertion simply misstated *Taylor* because that case did not say that *no* sanction could be enforced unless the violation was willful: rather, it said only that the *ultimate* sanction of *preclusion* could not be imposed unless the violation was willful. 484 U.S. at 415. And, for the same reason, the second assertion - that *Taylor* left open the question of whether preclusion required willfulness - was simply wrong. *Ibid.*[32]

Finally, the court declined to decide that issue because it found any violation harmless error. *Id.* at 446-7. Accordingly, the court's claim that *Taylor* left open the issue of whether preclusion required willfulness was pure *dictum.*

Tenth Circuit. *Watley v. Williams*, 218 F.3d 1156 (10th Cir. 2000) involved the preclusion of evidence where defense counsel's discovery violation had not been willful. The court held that "Reasonable minds may disagree about the appropriateness of excluding an alibi witness whom Petitioner's counsel did not willfully omit, but under AEDPA we are limited to applying existing Supreme Court precedent", *i.e.*, *Taylor* had not held that willfulness was always required for

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[31] Notably, the Circuit did not cite to any portion of *Taylor* to support its assertion.

[32] It should also be noted that Judge Flaum, in concurrence, held that *Taylor* had expressly held that willfulness was a prerequisite to preclusion": however, he also agreed that the erroneous preclusion of evidence was harmless. *Id.* at 450.

preclusion. *Id.* at 1159.

Based on the foregoing, although decisions from the allegedly "split" Circuits contain statements appearing to call the holding of *Taylor* that preclusion requires willfulness into question, some of those statements simply did not do that, some of the statements were *dicta*, others have been "overruled" by later decisions agreeing that *Taylor* held that preclusion requires willfulness, and others were simply wrong. In other words, any "split" in the Circuits is more apparent than real. And that conclusion is reinforced by the fact that *certiorari* was denied in several of those case desp[ite a claim of a split in the Circuits. *See, e.g., Noble v. Kelly,* 246 F.3d 93 (2d Cir.), *cert. den.* 534 U.S. 886 (2001), Petition for Writ of Certiorari, Dkt. No. 01-28, at Point I .

c) It is "hornbook law" that this Court will not issue an "advisory opinion". It is submitted that any decision in this case would constitute such an opinion, for two separate reasons.

i) The lower courts granted the writ in this case on two grounds: first, that the exclusion of alibi evidence violated *Taylor*; and, second, that defense counsel was incompetent for not filing any alibi notice. The incompetence of counsel ground is *wholly independent* of the *Taylor* ground and, even if *certiorari* was granted on the *Taylor* ground and that ground was decided against respondent, respondent would still be entitled to the same relief he has already received, *i.e.,* the writ would still be granted. Accordingly, any decision on the *Taylor* ground would constitute a purely "advisory opinion", which this Court has repeatedly held it will not render. *See, in general, Herb v. Pitcairn,* 324 U.S. 117, 125-6 (1945)("Our only power over State judgments is to correct them ..., not to revise opinions. We are not permitted to render an advisory opinion, and *if the same judgment would be rendered by the ... court after we corrected its view of ... [a portion of the] law, our review would amount to nothing more than an advisory opinion*"). *Cf. Fay v. Noia,* 372 U.S. 391, 430-1 (1963),

overruled on other grounds, Coleman v. Thompson, 501 U.S. 722 (1991)(Supreme Court will not address merits of *habeas corpus* issue, where "independent and adequate state ground" for denial of writ exists: citing to, and quoting from, *Herb v. Pitcairn, supra*).

Since, as will be demonstrated, *infra*, there is no basis for granting *certiorari* to examine the second ground on which the writ was granted, *certiorari* should also be denied on the first ground. *See, also, Stern and Gressman,* Supreme Court Practice, 455 (*certiorari* usually denied where "the decision below is correct without regard to the question sought to be raised by the petition, and ... as a result, the Supreme Court would not likely reach the point of alleged importance or conflict").

ii) Assuming, *arguendo,* that, despite the foregoing, this Court granted *certiorari* to decide the *Taylor* issue, and then decided that *Taylor* did *not* require willfulness in order to preclude unnoticed evidence, there would have to be a remand for the lower courts to decide whether preclusion was permissible on all of the *Taylor* factors. However, the lower courts have already ruled that none of the other factors - such as prejudice to the prosecution - existed to any appreciable degree, and that lesser sanctions - such as the mandatory three-day adjournment - would have remedied any prejudice that did exist. Pet. Appx at 31a-32a, 92a and n. 27. Therefore, any decision by this Court on the merits would also constitute an impermissible "advisory opinion". *Herb v. Pitcairn, supra.*

In sum, *Taylor* clearly established that preclusion is only permitted where there was a willful violation of a discovery rule, there is no "split in the Circuits" on that issue, and granting *certiorari* (and/or deciding this case) would constitute an "advisory opinion". Accordingly, *certiorari* should be denied.

2. Petitioner's second ground for *certiorari* - that "the courts below wrongly applied Second

Circuit law when there was no clearly established law from this Court" (Pet. at 15) - requires little discussion.

In the first place, and as established above (*see* 1 (a)), there was , and is, clearly established law from this Court, *i.e., Taylor v. Illinois* and *Michigan v. Lucas, supra.*

Secondly, the lower courts' reference to *Noble v. Kelly,* 89 F.Supp.2d 443 (S.D.N.Y. 1999), *aff'd* 246 F.3d 93 (2d Cir.), *cert. den.,* 534 U.S. 886 (2001), was perfectly proper because that case relied on *Taylor, supra. See* , 89 F.Supp.2d at 454-61, 246 F.3d at 99-102 (discussing, and applying *Taylor*).

Finally, and to paraphrase the District Court (*see* Pet. at 30a-31a, n. 10), "*Williams* [*v. Taylor*, 529 U.S. 362 (2000)], does not indicate that a district or circuit court is required, or even permitted, to disregard the Circuit's interpretation of 'clearly established Federal law, as determined by the Supreme Court ...". Such a reading of *Williams* is inconsistent with the history and structure of our federal courts".[33]

Accordingly, *certiorari* should be denied.

3. Petitioner's third ground for *certiorari* - that the lower courts' analysis of the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984) "conflicts with this Court's *habeas* jurisprudence (Pet. at 17) - also merits only short shrift.

The State court held that defense counsel's incompetence was not prejudicial error (Pet. Appx at 108a). Petitioner asserted that the lower Federal courts merely "substituted [their] own independent judgment" for that of the State court, rather than finding that court's holding "objectively

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[33] Again, and as with petitioner's first ground, granting *certiorari* (and/or deciding this case) on the second ground would also constitute an "advisory opinion".

unreasonable" (Pet. at 17-18).

A plain reading of the lower court decisions makes it clear that, rather than substituting their judgment for that of the State court, the courts found that holding "objectively unreasonable". As the Magistrate Judge held:

> With regard to the second prong of the *Strickland* analysis, the petitioner has also met his burden.... [T]he preclusion of Mr. Rodriguez deprived the petitioner of a critical witness who would have provided testimony closing any time gap in the alibi.[34] Finally, it is more than a 'reasonable probability' that the trial result would have been different 'but for' the errors of Mr. Rawlins, thus depriving the petitioner of a fair trial....
> The state court in this case found that the 'defendant received meaningful representation. Counsel's alleged error could not have deprived defendant of a fair trial.... The state court's application of clearly established federal law in denying the petitioner's effective assistance claim of appeal was *objectively unreasonable*". *See Williams*, 529 U.S. at 409 ('[A] federal *habeas* court making the "unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively unreasonable*'). There was no reasonable justification for its conclusion that the preclusion of Mr. Rodriguez did not result in the deprivation of a fair trial for the petitioner. *See id.* at 411 ('[A] federal *habeas* court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable'). Accordingly, trial counsel's performance was constitutionally ineffective, and that provides a second ground for issuance of a writ of *habeas corpus*. 103a-105a (emphasis added).[35]

As a matter of fact, the portions of *Williams v. Taylor, supra,* cited to, and quoted from in the above passage were the very portions of that case that petitioner asserted the lower courts ignored. *Compare* Pet. Appx at 105a *with* Pet. at 17.

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[34] That refers to the trial prosecutor's summation, in which he argued that the testimony of one of respondent's other alibi witnesses was "too early" and the testimony of the other alibi witness was "too late", *i.e.*, there was a "time gap" during which respondent could still have committed the crime. Pet. Appx at 99a-100a.

[35] The District Judge "agree[d] with the Report's conclusion that the Appellate Division's denial of Bohan's ineffective assistance of counsel claim was 'an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court'". Pet Appx at 41a-42a.

In sum, there is no basis for granting *certiorari* on this ground.[36]

CONCLUSION

For the above reasons, respondent Robert Bohan respectfully requests this Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

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[36] In view of the demonstrated lack of "certworthiness" in this ground, it is respectfully suggested that petitioner, aware of the rule against advisory opinions (*see* 1 (c), *supra*), merely "tacked on" this ground in an attempt to bolster her arguments for *certiorari* regarding *Taylor*.